

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TONY D. PENWELL,

Plaintiff,

v.

BOB DENEUI, et al.,

Defendant.

No. C07-027MJP

ORDER GRANTING DEFENDANT
LISA SALMI'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendant Lisa Salmi's motion for summary judgment. (Dkt. No. 61). After reviewing the motion, Plaintiff's response (Dkt. No. 67), Ms. Salmi's reply (Dkt. No. 68), and all documents submitted in support thereof, the Court GRANTS Defendant's motion and Plaintiff's claims against Lisa Salmi are dismissed with prejudice.

Background

Mr. Penwell brings claims under 42 U.S.C. § 1983 alleging that Defendants have violated his constitutional rights during his incarceration at the King County Regional Justice Center ("RJC"). Specifically, Mr. Penwell identifies Lisa Salmi as "[t]he acting executive director of The Board of Pharmacy" and alleges that Ms. Salmi "knows the [RJC] Pharmacy is not in compliance" and that "Plaintiff has been given the wrong medications" or that distribution of his medication is often delayed. (Cmplt. ¶¶ 70 & 78.) Mr. Penwell bases his constitutional claim on the failure of RJC pharmacy

1 personnel to timely and correctly dispense his prescribed medications, asserting that the “failure to fill
2 the [medication] order caus[es] suffering.” (Cmpl’t. ¶ 70.)

3 Discussion

4 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and
5 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
6 material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.
7 56(c). The moving party bears the burden of demonstrating that there is no genuine issue of fact for
8 trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once she meets that burden, a moving
9 party will succeed on summary judgment by showing “that there is an absence of evidence to support
10 the nonmoving party’s case.” Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

11 Ms. Salmi is protected from suit in her official capacity by the Eleventh Amendment but may
12 still be liable as an individual. Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989). 42
13 U.S.C. § 1983 provides that “(e)very person who, under color of any statute of any state . . . , subjects,
14 or causes to be subjected, any citizen of the United States or other person within the jurisdiction
15 thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,
16 shall be liable to the party injured” To succeed on his claim, Mr. Penwell must show: (1) that
17 Ms. Salmi acted under color of state law; and (2) that Ms. Salmi’s conduct deprived Mr. Penwell of
18 rights protected by the Constitution or laws of the United States. Staats v. Brown, 139 Wn. 2d 757,
19 771 (2000).

20 The second prong requires a showing that Ms. Salmi “caused” Mr. Penwell to be subjected to
21 a constitutional deprivation. “The inquiry into causation must be individualized and focus on the
22 duties and responsibilities of each individual defendant whose acts or omissions are alleged to have
23 caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

24 Ms. Salmi states in her affidavit that she “was the Acting Director of the Washington State
25 Board of Pharmacy from July 2006 until August 2007” and “was not an agent or employee of the King

1 County Regional Justice Center.” (Salmi Decl. ¶ 2.) Ms. Salmi declares that she “had no supervisory
2 authority over employees at the RJC and did not authorize, control, or, in any way, effect [sic] the
3 decisions of employees at the RJC involved in the distribution of medications to the plaintiff.” (Salmi
4 Decl. ¶ 2.) Mr. Penwell has not produced any evidence countering Ms. Salmi’s affidavit. He has
5 failed to show that Ms. Salmi performed “an affirmative act, participate[d] in another’s affirmative
6 acts, or omit[ted] to perform an act which [s]he [wa]s legally required to do that cause[ed] the
7 deprivation [of which he complains].” Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir. 1978)
8 (internal citation omitted). Nor has Mr. Penwell shown that Ms. Salmi “set[] in motion a series of acts
9 by others which [she] [knew] or reasonably should [have] know[n] would cause others to inflict the
10 constitutional injury.” Id.

11 Even if it could be shown that Ms. Salmi had a right to control the RJC Pharmacy employees,
12 Mr. Penwell has not demonstrated that she “ implicitly authorized, approved or knowingly acquiesced
13 in the unconstitutional conduct of the offending subordinate.” Bellamy v. Bradley, 729 F.2d 416, 421
14 (6th Cir. 1984). “There must be a showing that the supervisor encouraged the specific incident of
15 misconduct or in some other way directly participated in it.” Id. Even if, as Mr. Penwell alleges, Ms.
16 Salmi “continued to let the Pharmacy function for years knowing it was not in compliance,” such
17 action does not equal implicit authorization, approval or knowing acquiescence in the failure to timely
18 and correctly deliver Plaintiff’s medications. (Cmplt. ¶ 78.) Ms. Salmi asserts that she “had never
19 heard of [Mr. Penwell] until this lawsuit” and “was not aware of any claims he made during [her]
20 tenure as the Acting Director of the Washington State Board of Pharmacy that his medical needs were
21 not being addressed by employees of the RJC Pharmacy.” (Salmi Decl. ¶ 3.)

22 To prevent an entry of summary judgment against him, The Federal Rules of Civil Procedure
23 require that Mr. Penwell “set forth specific facts showing that there is a genuine issue for trial” by
24 affidavits or as otherwise provided in the rule. Fed. R. Civ. P. 56(e). Plaintiff did not submit an
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1 affidavit or other evidence countering Ms. Salmi's claim that she had no authority over the RJC
2 pharmacy employees and has failed to provide evidence that a genuine issue of material fact exists for
3 trial. While Mr. Penwell asserts that he has "overwhelming evidence" to support his allegation that
4 Ms. Salmi "personally had knowledge and made decisions had authorization [sic] to approve or not, to
5 allow the Jail Health Service (JHS) to continue to operate under conditions that were indifference [sic]
6 to the Plaintiff and other inmates at the King County RJC (medical needs)," he does not offer such
7 evidence in his pleading. (Pl.'s Resp. at 2 & 3.)

8 Although Mr. Penwell contends that "Attachment (A) shows [that Ms. Salmi had] such
9 authority," that attachment consists of the Washington State Department of Health's "Disciplinary
10 Guidelines Manual" which neither describes Ms. Salmi's role as Director of the Board of Pharmacy
11 nor gives any detailed description of the RJC Pharmacy conditions. (Dkt. No. 67, pp. 6-45.) Plaintiff
12 also attaches to his pleading a memorandum from Stan Jeppesen, a "Pharmacist Investigator," to the
13 Board of Pharmacy dated March 27, 2006. (Dkt. No. 67, pp.43-45.) This document relates an
14 investigation of the King County Jail Health Services and details several problems with pharmacy
15 operations including a failure to comply with approved policies and ongoing prescription errors
16 "regarding the delivery of the correct product in a timely fashion for the inmates." (Dkt. No. 69 at
17 43.) This document does not indicate that the Board of Pharmacy has authority over RJC pharmacy
18 operations and is dated over three months before Ms. Salmi became the Director of the Board of
19 Pharmacy. (Salmi Decl. ¶ 2.)

20 The Court acknowledges Mr. Penwell's request that, because he is "still without his legal
21 materials and support, including any and all supporting Case Law," the Court "consider this motion
22 with the same weight as if it [i]ncluded such Case Law." (Pl.'s Resp. at 1.) The Court assures Mr.
23 Penwell that it has conducted thorough research on his constitutional claim. Mr. Penwell has also
24 requested that the Court refrain from ruling on this motion until discovery is complete. The Federal
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1 Rules of Civil Procedure provide that “the court may refuse the application for judgment or may order
2 a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had”
3 only if the nonmoving party produces an affidavit demonstrating that he cannot “present by affidavit
4 facts essential to justify [his] opposition.” Fed. R. Civ. P. 56(f). Mr. Penwell has not submitted such
5 an affidavit.

6 **Conclusion**

7 Ms. Salmi has sufficiently shown that no genuine issue of material fact exists for trial and that
8 Plaintiff lacks evidence to support his claims against her. The Court GRANTS Ms. Salmi’s motion for
9 summary judgment and dismisses with prejudice Plaintiff’s claims against her.

10 The Clerk is directed to send copies of this order to all counsel of record and to mail a copy
11 directly to Plaintiff.

12 Dated: January 22, 2008.

13 /s/Marsha J. Pechman

14 Marsha J. Pechman

15 United States District Judge
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